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JAMES H. McKENNEY,
Clerk

No. 1583 Misc. 51

Brief of Bell & Samuels for Petr

Filed March 2, 1901.

In the Supreme Court of the United States.

In the Matter of the Petition of EDWARD HOWARD CLARKE for a writ of certiorari to the Circuit Court of Appeals of the United States, in the Second Circuit, to review an order affirming an order of the District Court, sitting as a court of bankruptcy in the matter

of

RAYMOND W. KENNEY,
Bankrupt.

WILBUR H. LARREMORE, Trustee in Bankruptcy,
Respondent.

Original Motion.

Motion and Argument.

This is a motion for a writ of *certiorari* to review the affirmance by the Circuit Court of Appeals in the Second Circuit of an order made by the District Court in bankruptcy, directing the Sheriff of the County of New York to pay over to the trustee of Raymond W. Kenney, bankrupt, the sum of $12,451.09. On March 6th, 1899, the petitioner Clarke recovered judgment against Raymond W. Kenney in the Supreme Court of the State of New York, for $20,906.66, and execution was issued on the

same day. On March 15th, 1899, the Sheriff sold Kenney's stock of goods which he had levied upon for $12,451.09. On April 13th, 1899, a petition in involuntary bankruptcy was filed against Kenney and he was adjudicated a bankrupt, on July 12th, 1899. Mr. Larremore was afterwards appointed his trustee. The sheriff not having paid over the proceeds of the execution at the time the petition was filed, he was temporarily enjoined by the United States District Court Judge from doing so, and subsequently the same Judge made the order directing the sheriff to pay over the money in his hands to the trustee. The execution creditor Clarke filed a petition for a review of the said order with the United States Circuit Court of Appeals, and that Court after hearing, affirmed the same, to review which affirmance a writ of *certiorari* is herein applied for.

POINTS.

I.

The Supreme Court has jurisdiction to issue a writ of certiorari to remove the record of the controversy in bankruptcy herein to itself from the Circuit Court of Appeals for the purpose of reviewing the decree of the latter Court.

The present petition is presented under Section 25, Subdivision d, of the Bankrupt Act.

This provision was undoubtedly enacted to prevent a defect of jurisdiction which existed under the Act of 1867, viz.; that no appeal could be taken to this Court from a decree of the inferior Courts

exercising supervisory jurisdiction over the decrees of Courts of bankruptcy in bankruptcy proceedings, (Morgan v. Thornhill, 11 Wall. 65; Cleveland Ins. Co., v. Globe Ins. Co., 98 U. S., 366). Its intention is to confer upon this Court the same jurisdiction in bankruptcy proceedings as is created by the Act of March 3, 1891, Section 6, in other cases where a judgment of the United States Circuit Court of Appeals is final.

It provides first that *controversies* may be certified to this Court from other Courts of the United States, which would include the Circuit Courts of Appeal. A proceeding in bankruptcy is a suit, (Sandusky v. National Bank, 23 Wall. 289, 292-293) and a "controversy" is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation and is presented by pleadings for judicial determination.

> Gaines v. Fuentes, 92 U. S , 10, 20.
> Searl v. School District No. 2, 124 U. S., 197, 199.

The further provision in Subdivision d, Section 25, that this Court may exercise jurisdiction of such controversies and issue writs of *certiorari* pursuant to the provisions of the United States law now in force, was intended to confer the same power to take appellate jurisdiction through the medium of writs of *certiorari* as is granted by Section 6 of the Act of March 3, 1891, establishing Circuit Courts of Appeal. It did not mean to confer such grant of jurisdiction only in a case where the inferior Court would certify the controversy, because in that event the power to take jurisdiction would be implied and need not be expressed, and the necessity of issuing a writ of *certiorari* would not arise. This subdivision of Section 25, means

that application for a certification of the controversy must first be made to the inferior Court, and if that application be denied, this Court may, on application duly made to it, take jurisdiction of the controversy and remove the record thereof to itself by *certiorari*. In the case at bar an application for a certification of the controversy has been made to the U. S. Circuit Court of Appeals, and has been denied.

II.

The Sheriff having sold the goods levied on, and reduced the same to money before the filing of the petition in bankruptcy, such money was the property of the plaintiff in execution and not that of the bankrupt at the time of the adjudication, and the trustee therefore has no title to the same.

The relief sought by the trustee herein was claimed under Sec. 67 Clause f, of the Bankrupt Act. That paragraph in specifying the property which shall pass to the trustee evidently contemplates that at the time of the adjudication of bankruptcy there must be in existence property of the bankrupt on which rests one of the liens mentioned, in order that the adjudication should act upon it. A sum of money in the sheriff's hands made under an execution is not property subject to a lien as described in that paragraph, but the sheriff owes it to the execution creditor, and the debt thus existing is the property of the latter.

The paragraph mentioned, in specifying the various judicial liens, does not mention executions.

It speaks only of "levies" evidently intending the levy as the ultimate stage of the execution in which the adjudication of bankruptcy should have power to operate upon the lien. It is clearly the intention of Congress that when the enforcement of an execution has proceeded so far as to have passed beyond the stage of the levy, it should no longer be interfered with by an adjudication in bankruptcy, otherwise, the act would not have spoken of levies, but of executions generally.

The question then involved in this case is, since Sec. 67, Clause f, provides that the liens mentioned shall be deemed null and void in case the alleged bankrupt is adjudicated as such and the "*property affected by such lien*" shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, can money made by a sheriff by levy and sale under an execution before the filing of the petition be regarded as "*property of the judgment debtor affected by a levy*"?

While the personal property continues to rest under the levy, the judgment debtor remains the owner thereof, and he can convey title subject to the lien of the execution.

Mumper v. Rushmore, 79 N., Y. 19.

After sale, the money realized belongs in effect to the judgment creditor.

It is doubtless the law that the specific coins or bills which have been realized by the sheriff on an execution sale are not the chattels of the execution creditor, and for that reason cannot be levied upon specifically as his property. The sheriff, however, by virtue of his proceedings becomes the debtor to the plaintiff in execution to the extent of the money realized by him.

Turner v. Fendall, 1 Cranch, 117.

The specific money collected by the sheriff belongs to him, and if it is lost before payment to the judgment creditor, the loss falls on the officer; as for example, if he deposits it in a bank which fails.

Phillips v. Lamar, 27 Ga., 228;
Shaw v. Bauman, 34 Ohio St., 32.

Or if it be stolen from him:

Gilmore v. Moore, 30 Ga., 628;
United States v. Dashiell, 4 Wall., 182 (case of U. S. Paymaster).

The New York Code of Civil Procedure provides that an execution against property "must substantially require the Sheriff *to satisfy the judgment*" out of the property of the judgment debtor. C. C. P., Sec. 1369. The mere levy is not a satisfaction. The satisfaction is complete when the title to the goods levied on is changed by the act of the sheriff.

United States v. Dashiell, 3 Wall. 688.

That it is the receipt of the money by the Sheriff and not by the creditor which extinguishes the judgment, is shown by N. Y. Code of Civ. Pro., Sec. 1266, which provides that "a sheriff upon being paid the full amount due upon an execution in his hands must immediately endorse thereupon a return of satisfaction thereof."

It is well settled that a sheriff collecting money on execution, becomes a debtor to the execution creditor for the amount collected, and the latter has a cause of action against him for money had and received without demand.

Brewster v. Van Ness, 18 Johns., 133.
Dygert v. Crane, 1 Wend., 534.

People v. Dunning, 1 Wend. 16.
Walden v. Davidson, 15 Wend., 575.

In such an action not only the debt, but interest may be recovered.

Slingerland v. Swart, 13 Johns., 225.
Crane v. Dygert, 4 Wend., 675.

The Sheriff is in the same position as a bank with whom a depositor has deposited money. The latter loses his title to the specific deposits and they could not be levied on under an execution against him even if the bank were to pick them out and set them aside for the purpose of such levy. Carrol v. Cone, 40 Barb., 220. But he has an action against the bank for the amount of his deposit, and his *claim* could be attached as a *chose in action*. In like manner, money collected by a Sheriff on execution could be attached as against the execution creditor as the latter's *chose in action*.

Wehle v. Connor, 83 N. Y., 231.

In Nelson v. Kerr (59 N. Y., 224), the Court say: "The Sheriff in collecting an execution, acts "as the officer of the Court whose process it is, and "also as the *agent* appointed by law of the party "who seeks by aid of the writ to obtain satisfaction "of the debt or thing awarded by the judgment. "*The money collected by the Sheriff belongs to the* "*plaintiff. The Sheriff when he receives it acts as* "*the agent of the party who has the judgment,* "*and it is money had and received by him to the* "*plaintiff's use.*"

So clearly is the money collected by the Sheriff on execution the property of the execution creditor, that if the Sheriff has by mistake paid the money over to a third party, the execution

creditor himself, and not the Sheriff, can sue the latter for the money as his own.

Kingston Bank v. Eltinge, 40 N. Y., 391.
Haebler v. Myers, 132 N. Y., 363, 369.

In the Kingston Bank case the Court say at page 395: "The money thus received by the defendant was the plaintiff's money. That it did not belong to the defendant, follows necessarily." The plaintiff here referred to was the execution creditor.

This property right in an execution creditor arises only after a sale has been made and the money collected by the Sheriff. Before that time he has no right of property whatever in the goods levied upon. In the case of an injury to those goods by a wrong doer, or of loss of their possession by the Sheriff, the latter or the judgment debtor can sue, and not the creditor. The latter can sue in a certain case provided for by Statute, *but not at common law.*

Scott v. Morgan, 94 N. Y., 508.

It follows from the identification of the execution creditor with the Sheriff as principal and agent by operation of law, that if the property levied on is injured, lost or destroyed by the act of the officer, the loss as between the creditor and the debtor falls on the former and not on the latter. The execution is in that event deemed satisfied to the extent of the property levied on, and the claim of the creditor to recover his debt thereafter exists against the Sheriff and not against the execution debtor.

Peck v. Tiffany, 2 N. Y., 451.
United States v. Dashiell 3 Wall., 688.
Matter of Dawson, 110 N. Y., 114.

In the matter of Dawson (*supra*), it was held, that where a sheriff misappropriates money

collected by him under a writ of attachment, that the plaintiff in the suit, and not the defendant, must bear the loss. The Court say at page 117:

"The question now to be determined is, who is to "bear the loss of the Sheriff's misconduct and de- "fault, plaintiffs or defendant? We think the "loss should fall upon the plaintiffs. If this "money had been seized by virtue of an execution, "and the defendant had been deprived thereof, it "is well settled that the loss would fall upon the "plaintiffs, and that to the extent of the property "thus taken the judgment and execution would be "satisfied." And again at page 118: "*If this "money had been seized by virtue of an execution, "it would at once have operated as a payment pro "tanto upon the execution.* Here in theory of "law, the money is in the possession of the Sheriff, "and when execution was issued to him it was at "once applicable thereon, and must be deemed to "have been so applied. If the Sheriff had been "found within his county, and the execution "had been actually delivered to him, he could "not have returned the same unsatisfied, but could "have been compelled to return the same satisfied "as to the amount of money received by him upon "the attachment. (Code Sec. 708). And such a "return would have been conclusive in favor of "the defendant, and would have left the plaintiffs "with their remedy against the sheriff for money "received by him."

In other words, the Sheriff being the agent of the execution creditor, a payment to the former is in law a payment to the latter. It is just the same as though the money had been paid to the plaintiffs' attorney in the action, or other agent. The consequence is, that when this money has been received by the Sheriff, it is no longer the property

of the judgment debtor. There is no lien upon it for anybody. It is, in effect, the property of the creditor, whose only claim after its receipt by the Sheriff is against the latter as his collecting agent. Such being the status of the fund, Section 67 of the Bankrupt Law does not apply to it. It is no more to be regarded as the property of the judgment debtor affected by a lien than if it were in the hands of the execution plaintiffs' attorney.

The learned Judge who delivered the opinion of the United States Circuit Court of Appeals herein, holds that these principles which were urged by us, do not apply, because the money received by the sheriff takes the place of the goods levied on, and must be regarded as property of the debtor covered by the lien. This would be correct if the goods had been sold under an *attachment*, as perishable property for example, and the money held by the Sheriff to await the subsequent judgment in the action. An execution rests on different principles by reason of the fact that the plaintiffs' claim against the defendant has been previously settled by judgment, and the money collected by the sheriff, satisfies the judgment at the very instant of its receipt by him.

Another point made in the said opinion is, that the execution creditor's rights are of no effect because they rest on proceedings which, having been taken within four months prior to the filing of the petition in bankruptcy, are to be deemed null and void. This overlooks the fact that the execution had fulfilled its office and become *functus officio*, and in fact the sixty days time allowed for its return had expired, before the adjudication in bankruptcy, which event under Section 67 of the Bankrupt Law was to effect its dissolution. The execution was issued March 6th, 1899, and had sixty days to run (fol. 134); and the judgment

debtor was adjudicated a bankrupt July 12th, 1899 (fol. 119). There was therefore no lien in existence at the time of the adjudication to be operated upon, and we have found no case which holds that the adjudication should operate retrospectively to dissolve a lien which had been created within four months, but had also fulfilled its object and terminated in its existence within that time. That the contrary is the true rule is shown in Conner v. Long, 104 U. S., 228, where the question is fully discussed.

Under the Bankrupt Act of 1867, the assignment in bankruptcy related back to the commencement of the proceedings and dissolved any attachment on the bankrupt's property made within four months next preceding such commencement.

In Conner v. Long (*supra*), the Court at pages 231-232 shows that it is an attachment then existing which is dissolved by the filing of the petition in bankruptcy, and not one which has been previously merged into a sale. Thus, it says, that if the goods levied on have been previously sold, the assignee cannot follow them, "for the latter, not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not transferred to the assignee." The Court, however, says, that if the proceeds of the sale remain in the hands of the Sheriff *after the filing of the petition*, the assignee may recover them from the officer. The reason is that the lien of the attachment is transferred from the goods to the money derived from their sale, and that lien being in existence when the petition is filed, is dissolved by that event and the right to the money passes to the assignee. We have above shown that that rule would not apply to an execution. The Court further holds that if *after* the filing of the petition, the money is paid to the plaintiff in

the attachment suit by the Sheriff, the assignee may recover it from the former. It does not say that if the money had been paid over *before* the filing of the petition the same result would follow. The same judge who decided the case at bar held in another suit that if money made under circumstances like the present had been paid over by the Sheriff to the execution creditor before the filing of the petition in bankruptcy, it could not be recovered by the trustee.

In re Blair, 102 Fed. Rep., 987.
See *in re* Easley, 93 Fed. Rep., 419.

The Court in Conner v. Long further holds that if the property had been sold after the filing of the petition, the attachment lien thereon was at once dissolved by such filing and the assignee can follow the property into the hands even of an innocent purchaser or hold the Sheriff for a conversion. It was to avoid such injustice that Section 67, Clause f, of the present Act contains the saving in favor of innocent purchasers.

The fact that that section and subdivision provides that the Court may order the right under the levy or other lien to be preserved for the benefit of the estate and order such conveyance as may be necessary, shows that it refers to an existing lien. Under one already extinguished by its prior enforcement there would be no "right" in existence to be preserved, and such a lien could not possibly be "conveyed".

If the view taken in the opinion of the Circuit Court of Appeals herein is a correct one, that the proceedings to enforce the execution are null and void, notwithstandnig their completion before the filing of the petition in bankruptcy, it will necessarily follow that the Sheriff is a trespasser and must

account for the proceeds of the execution to the trustee in bankruptcy, notwithstanding that he may have paid them over in good faith to the execution creditor before any petition in bankruptcy was filed.

The provision in Section 67, Clause f, that it shall not affect the title obtained under the lien by an innocent purchaser for value, does not militate against our view, because that provision was intended to apply to the case of a purchaser who bought after the filing of a petition in bankruptcy without notice thereof. As to a purchaser who had bought before such filing, although within the four months, no such provision was necessary, because his title being good when acquired, could not be affected by bankruptcy proceedings which occurred subsequently.

It is respectfully submitted that the writ of certiorari should issue as prayed.

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